



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 19, 1996

Mr. Jerome H. Supple
President
Southwest Texas State University
601 University Drive
San Marcos, Texas 78666-4615

OR96-0576

Dear Mr. Supple:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 27146.

Southwest Texas State University ("SWT") received a request for information relating to a disciplinary action and sexual harassment investigation against an SWT employee. You claim the information is excepted from required public disclosure under sections 552.026, 552.101, and 552.114 of the Government Code.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." For information to be protected from public disclosure under the common-law right of privacy as section 552.101 incorporates it, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* court stated that

information . . . is excepted from mandatory disclosure under Section [552.101] as information deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

540 S.W.2d at 685; Open Records Decision No. 142 (1976) at 4 (construing former V.T.C.S. article 6252-17a, section 3(a)(1)). In *Industrial Foundation*, the Texas Supreme Court considered intimate and embarrassing information such as that relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

This office has previously opined that the common-law privacy aspects of section 552.101 did not apply to witness names and statements regarding allegations of sexual misconduct. Open Records Decision No. 579 (1990). However, the court in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), held that "names of witnesses required to give information under threat of discipline, their statements regarding highly embarrassing, offensive and unprofessional conduct in the workplace, their dating and sexual relationships, the state of marriages and other highly personal material" are protected from disclosure under the privacy exceptions as described by the *Industrial Foundation* court. *Ellen*, 840 S.W.2d at 524-25. The court, however, ordered the affidavit of the person under investigation and the conclusions of the board of inquiry released to satisfy the legitimate public interest. *Id.*

We believe that *Ellen* is controlling on the documents at issue in your request. To satisfy the public's interest, the city must release the following documents with identifying information of witnesses redacted: Memorandum dated February 10, 1994, from Edwin Miles to Patrick Cassidy; memorandum dated May 12, 1994, from Edwin Miles to Patrick Cassidy; memorandum dated May 20, 1994, from Patrick Cassidy to Dr. Chahin; memorandum dated May 23, 1994, from Patrick Cassidy to Dr. Chahin; the suggested order of interviews dated June 1, 1994; and memorandum dated June 8, 1994, from Affirmative Action Sexual Harassment Panel to Robert Gratz.¹ General information about disciplinary action taken against employees may not be withheld under section 552.101. Open Records Decision Nos. 473 (1987) (even highly subjective evaluations of public employees may not ordinarily be withheld under section 552.102), 470 (1987) (public employee's job performance does not generally constitute *private* affairs); 444 (1986) (public has a legitimate interest in knowing the reasons for the dismissal, demotion, promotion, or resignation of a public employee), 438 (1986) (public clearly has a legitimate interest in knowing the details of an apparently well-founded accusation against a city supervisor); 336 (1982) (names of employees taking sick leave and dates thereof are not excepted by section 552.102). Accordingly, the following documents must be released: Memorandum dated February 8, 1994, from Patrick Cassidy to Dr. Gratz, Bill Fly, and Dr. Chahin with attached letter to Edwin Miles; memorandum dated May 16, 1994, from Patrick Cassidy to Edwin Miles; letter dated May 17, 1994 from Jim Conley to John McBride; letter dated May 20, 1994 from Patrick Cassidy to Edwin

¹Although the *Ellen* court implies that the person accused of misconduct may in some instances have a privacy interest in information contained within investigatory files, we think that in most cases the public's interest in disclosure greatly outweighs the accused's privacy interest. See 840 S.W.2d at 525.

Miles; step one grievance/complaint form of Edwin Miles; and the administrative/unclassified employee performance appraisal of Edwin Miles. All witness statements, however, must be withheld in their entirety. For your convenience, we have marked with red brackets the types of information contained in the documents that must be redacted.²

We note, however, that one of the documents contains the social security number of a SWT employee. A social security number is excepted from required public disclosure under section 552.101 of the act in conjunction with the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. See Open Records Decision No. 622 (1994) (copy enclosed). Based on the information you have provided, we are unable to determine whether the social security number at issue is confidential under this federal statute. We note, however, that section 552.352 of the Open Records Act imposes criminal penalties for the release of confidential information. Therefore, prior to releasing any social security number information, the district should ensure that the information is not confidential under federal law.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Records Division

LRD/LBC/rho

Ref.: ID# 27146

Enclosures: Open Records Decision No. 622 (1994)
Marked documents

²Because the information being released to the requestor does not identify or relate to student records, we do not address sections 552.026 or 552.114.

cc: Mr. Donald K. Jensen
University Star
Old Main, Room 102
Southwest Texas State University
San Marcos, Texas 78666
(w/o enclosures)